United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2326

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of	In Proceedings for an Arrangement
D. H. OVERMYER CO., INC. (Alabama)	No. 73 B 1126
D. H. OVERMYER CO., INC. (Arizona)	No. 73 B 1127
D. H. OVERMYER CO., INC. OF OHIO	No. 73 B 1128
D. H. OVERMYER CO., INC. (Ohio)	No. 73 B 1129
D. H. OVERMYER CO., INC. (California)	No. 73 B 1130
D. H. OVERMYER CO., INC. (Colorado)	No. 73 B 1131
D. H. OVERMYER CO., INC. (Connecticut)	No. 73 B 1132
D. H. OVERMYER CO., INC. (Delaware)	No. 73 B 1133
D. H. OVERMYER CO., INC. (Florida)	No. 73 B 1134
D. H. OVERMYER CO., INC. (Georgia)	No. 73 B 1135
D. H. OVERMYER CO., INC. (Illinois)	No. 73 B 1136
D. H. OVERMYER CO., INC. (Indiana)	No. 73 B 1137
D. H. OVERMYER CO., INC. (Kansas)	No. 73 B 1138
D. H. OVERMYER CO., INC. (Kentucky)	No. 73 B 1139
D. H. OVERMYER CO., INC. (Louisiana)	No. 73 B 1140
D. H. OVERMYER CO., INC. (Maryland)	No. 73 B 1141
D. H. OVERMYER CO., INC. (Michigan)	No. 73 B 1142
D. H. OVERMYER CO., INC. (Massachusetts)	No. 73 B 1143
D. H. OVERMYER CO., INC. (Minnesota)	No. 73 B 1144
D. H. OVERMYER CO., INC. (Mississippi)	No. 73 B 1145
D. H. OVERMYER CO., INC. (Missouri)	No. 73 B 1146
D. H. OVERMYER CO., INC. (Nebraska)	No. 73 B 1147
D. H. OVERMYER CO., INC. (Nevada)	No. 73 B 1148
D. H. OVERMYER CO., INC. (New Jersey)	No. 73 B 1149
D. H. OVERMYER CO., INC. (New Mexico)	No. 73 B 1150
D. H. OVERMYER CO., INC. (New York)	No. 73 B 1151
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BRIEF OF RECEIVER-APPELLANT

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D. H. OVERMYER CO., INC. (Washington)	No. 73 B 1161
D. H. OVERMYER CO., INC. (Wisconsin)	No. 73 B 1162
DHORE COMPANY, INC.	No. 73 B 1189
OVERMODAL TERMINALS, INC.	No. 73 B 1175

Debtors-Appellants,

-and-

ROBERT P. HERZOG,

Receiver-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF RECEIVER-APPELLANT

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STATEMENT OF ISSUES

Whether the lower courts erred in allowing the termination of leases in four proceedings where the landlords did not attempt to terminate the leases under the bankruptcy default provisions, but rather, on the basis of events occurring prior to the filing of the petitions for arrangement.

Whether the courts below erred in their determination that the debtors' proposed plan of arrangement is unfeasible.

Whether the District Court erred in its conclusion that the conduct of the debtors constituted a bar to equitable relief.

Whether the lower courts made clearly erroneous findings of fact.

Whether the District Court erred in its conclusion that there was no need for specific findings of fact with respect to the 15 separate proceedings at bar.

STATEMENT OF THE CASE

This is an appeal from the opinion and order of HON. HENRY F. WERKER, District Judge (7)* "so ordered" on October 4, 1974 (the "District Court Opinion") affirming the opinion of HON. ROY BABITT, Bankruptcy Judge, dated July 23, 1974 (the "Bankruptcy Court Opinion") (26).

On October 15, 1974, this Court expedited the appellate process by accelerating the time to serve and file briefs and permitting all parties to submit copies of their memoranda of law filed in connection with the appeal below, supplemented by typewritten briefs to this Court. The Receiver accordingly refers this Court to the "Brief of Receiver-Appellant", a copy of which is separately bound and comprises Appendix, Volume 2 (60-130) ("First Brief"). The entire factual background and some of the legal points involved in this appeal are developed in the First Brief. The issues discussed in the instant brief assume a reading of the First Brief.

The significance of this appeal in terms of equity and bankruptcy jurisprudence, as well as its effect on the debtors, has been described in the First Brief. The District

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*Unless otherwise indicated, all references are to pages in the Appendix, Volumes 1 and 2.

Court Opinion, however, magnifies this significance, primarily because it introduces tests of equitable conduct which effectively impede the application of the recent progressive decision by this Court in Queens Boulevard Wine and Liquor Corp. v. Blum, et al., ___F.2d___, Docket No. 73-1512 (2d Cir., filed June 11, 1974), Slip Sheet Opinion at 4113 et seq.

In addition, the District Court Opnion perpetuates one of the essential errors in the Bankruptcy Court Opinion by treating the appeal as if it were one consolidated proceeding rather than 15 different hearings involving 11 different debtors, subject to independent judicial review. The Receiver will show that the record does not support the generalized findings of fact in both lower court decisions, and that the specific facts of each controversy similarly do not support the legal conclusions reached by the courts below.

To highlight this approach, this brief will first address itself to the hearings with respect to the four warehouses where defaults under the bankruptcy provisions of the respective leases were never alleged, followed by an analysis of the plan of arrangement, four more cases and then the equities. The purpose of this order of

presentation is not only to show that the so-called findings of fact and conclusions of law in these eight analysed proceedings were erroneous, but also to show that each proceeding, including the remaining seven, is separate and distinct, typified by different facts and, accordingly, different equities.

POINT I

FOUR PROCEEDINGS IN WHICH THE LANDLORDS DID NOT RELY ON THE BANKRUPTCY DEFAULT CLAUSES ARE NOT ENCOMPASSED WITHIN THE BANKRUPTCY COURT OPINION.

THE DISTRICT COURT OPINION WITH RESPECT TO THESE FOUR PROCEEDINGS IS CLEARLY ERRONEOUS ON THE FACTS AND LAW.

The Receiver initially elected to prosecute his appeal with respect to 16 of the 24 warehouse leases encompassed within the Bankruptcy Court Opinion. In five of the adversary proceedings, involving the warehouses known as St. Louis 2 and 3, Richmond 1, Columbus 3, Denver 4 and Camden 2, the landlords did not rely on the bankruptcy forfeiture clauses in their respective leases in seeking termination, but rather, on other events of default such as alleged failures to pay rent.

The Receiver has elected not to prosecute his appeal with respect to the Camden 2 warehouse, thus reducing the total number of warehouses involved in this appeal to 15 and reducing the number of proceedings where the landlords did not rely on the bankruptcy default clause from five to four.

The Bankruptcy Court Opnion, based entirely on the enforceability of the boilerplate bankruptcy default

clause, failed to distinguish the four proceedings, where such a default was not alleged, from the rest. The Receiver and the four debtors thus found themselves in the anomolous position of having lost valuable long-term leases under an opinion by the Bankruptcy Judge based on a provision of their respective leases which was never at issue in these proceedings.

When the four landlords consciously decided not to seek the remedies, if any, available to them by virtue of the occurrence of the bankruptcy default, a classic waiver or estoppel occurred. This Court has emphatically approved these equitable defenses in insolvency cases:

> " . . . Placing the debtor in possession . . . would seem to have been sufficient to trigger the receivership clause, . . . and if . . . [the landlord] had promptly availed itself of its right to terminate on that ground, it would have been entitled -- unless the default in rent was cured . . . . -- to the relief which Referee Joyce ultimately granted. Such a 'right to terminate, may however, be waived or the landlord estopped to assert the right'. [Citing cases]." Speare v. Consolidated Assets Corporation, 360 F.2d 882, 887 (2d Cir. 1966). (Emphasis added.)

* * *

> "The leases contained a termination clause for insolvency, bankruptcy, filing,

> etc. . . . The . . . [landlords' representatives] intentionally refrained from attempting to terminate the leases for well over two months. . . . [T]he . . . [landlords] acquiesced in the reorganization proceedings and went on for more than two months accepting the benefits from it. We must hold then estopped from using these proceedings to terminate the leases. Davidson v. Shivitz, 354 F.2d 946, 948, 949 (2d Cir. 1966).

The four landlords at bar to this date have not sought to terminate their respective leases because of the filing of the insolvency petitions. They have not hesitated, however, to collect use and occupation payments from the Receiver, thus accepting the benefits of these proceedings. They have clearly waived any rights they may have obtained when the debtors filed the voluntary petitions, or are clearly estopped from asserting these rights.

With respect to their right to terminate by virtue of non-payment of rent prior to the filing of the voluntary petitions, the District Court Opinion purports to cure the failure of the Bankruptcy Judge to discuss these rights at all. The District Judge apparently made findings of fact with respect to each of the four proceedings on the basis of which he concluded that the leases in question were properly terminated. The District Judge states:

"This Court cannot see how in equity or in law these leases can now be resurrected." (21)

The findings of fact of the District Judge with respect to the four proceedings are clearly erroneous, and he errs in his conclusions of law.

St. Louis 2 and 3

The landlord contends that the lease for the St. Louis warehouse was terminated prior to the commencement of the within bankruptcy proceeding by virtue of (a) the mailing of a notice of default dated May 31, 1973 alleging rent and other defaults aggregating $43,398.00* (Exhibit "A" to Landlord's Amended Application [29A, Record on Appeal]); (b) a termination notice dated June 27, 1973 (Exhibit "B" to Landlord's Amended Application [29A, Record on Appeal]); and (c) the commencement of an unlawful detainer action in the Magistrate Court, City of St. Louis, Missouri in August 1973 (O-7).**

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*Subsequent to the debtor's receipt of the default notice alleging $43,398.00 in arrears, the Missouri debtor paid or caused to be paid $91,198.00 to the landlord to be credited to monies due under the lease. See pp. 16-20, infra.

**References to the transcripts of the relevant hearings before the Bankruptcy Judge, each of which is included in the Appendix, are cited by first indicating the alphabetical letter ascribed to such transcript in the Appendix, followed by the page number. Thus, "(O-7)" indicates that page 7 of transcript "O", the St. Louis 2 and 3 transcript, should be referred to. "(A-1)" would indicate that page 1 of transcript "A", the Boston 6 and 7 transcript, should be referred to.

Under Missouri law a landlord can proceed in one of two ways to terminate a lease and recover possession. The landlord may either (i) declare a "statutory forfeiture" under Chapter 535 of the Missouri Revised Statutes, or (ii) declare a "common law forfeiture" and commence an unlawful detainer action under Chapter 534 of the Missouri Revised Statutes.

Statutory forfeiture has been characterized by the Missouri Court of Appeals as "simple, expeditious" and also "fair and equitable". Fritts v. Cloud Oak Flooring Company, 478 S.W.2d 8, 11 (1972). In contrast, the remedy of common law forfeiture followed by a proceeding in unlawful detainer has been held to be a "harsh remedy". 478 S.W.2d at 11-12.

One reason for the sharp distinction drawn between statutory and common law forfeiture is that where the landlord seeks the statutory remedy, the tenant may cure the default by tendering the rent arrears before the Magistrate on the return date of the proceeding. Vernon's Annotated Missouri Statutes, § 535.040. This relief is not available to the tenant where the landlord pursues the common law forfeiture -- unlawful detainer strategy. In the instant proceeding, the landlord elected to follow the latter "harsh remedy".

Having sent a default notice and commenced an unlawful detainer action, the landlord takes the position that the lease has been terminated and the only issue is when the tenant is to be ousted from possession. The highest courts of Missouri disagree.

In Waring v. Rogers, 286 S.W.2d 374 (1956), a landlord declared a forfeiture of a lease by reason of various defaults including the failure of tenant to pay four months' rent. As in the instant proceeding, the landlord notified the tenant of its defaults by letter, purported to terminate the lease and commenced an unlawful detainer action.

The unanimous Missouri Court of Appeals, in Waring, refused to allow a termination of the lease noting that the landlord declined to follow the "simple method of statutory forfeiture" and instead:

> " . . . invoked the harsh method of common law forfeiture, seeking not only to terminate the estate, but also by proceeding in unlawful detainer to recover double damages and double rents and profits. §534.330 RSMO 1949, V.A.M.S. Under these circumstances the landlord will be held to the scrupulous observation of every requirement of the common law (citing cases)." 286 S.W.2d at 379.

The Missouri Court then found that inasmuch as no demand was made by landlord on the very day the rent came due for the precise amount then due, the landlord was not entitled to terminate the lease.

The distaste of the Missouri courts for leasehold forfeitures is set forth at length in the decision of the Missouri Court of Appeals in Fritts v. Cloud Oak Flooring Company, supra, where the landlord similarly sought a common law forfeiture of a lease for an alleged failure to pay rent. A default notice was given and an unlawful detainer action commenced.

The tenant had lagged in the payment of rent and by the middle of December 1968 rentals were about three months past due. (The lease provided that the landlord did not waive any of its rights by accepting late payments.) The parties thereupon modified the lease to provide that rent arrears would be liquidated and future rents would be paid "when due, time being of essence". 478 S.W.2d at 10. The modification of lease further provided that "any failure of (tenant) for any reason whatsoever, to pay installments of rental on or before the date such installment shall be due, shall result in the immediate termination of (tenant's) right to

possession . . . and that no notice of any kind of such failure to make payments shall be required to be given and that time is of the essence in the making of such payments". 478 S.W.2d at 10. (Underscoring by the Court.)

From December 1968 until January 1970 only two rent installments were paid when due. The other payments were late and accepted by the landlord until January 1970, when the landlord elected to declare a default and commence an unlawful detainer action.

The Court, noting that the landlord had elected the harsh remedy of common law forfeiture and unlawful detainer, stated:

> "Under such circumstances, the landlord is held to scrupulous observance of every requirement of common law unless waived by agreement (citing cases)." 478 S.W.2d at 12.

Observing that "forfeitures of leaseholds are viewed with disfavor" the Missouri Court of Appeals found that the landlord, by its conduct in accepting late rent payments over a period of time, waived the "time of essence" lease provision or was estopped from invoking it. 478 S.W.2d at 14. This result was achieved notwithstanding the "no waiver" provision of the lease. The Court stated:

"'In like manner, a provision that an express condition of a promise or promises in the contract cannot be eliminated by waiver, or by conduct constituting an estoppel, is wholly ineffective. The promisor still has the power to waive the condition, or by his conduct to estop himself from insisting upon it, to the same extent that he would have had this power if there had been no such provision.' 3A Corbin on Contracts § 763, p. 531." (citing cases) 478 S.W.2d at 14.

The general rule stated by the Missouri Court of Appeals in Fritts with respect to the waiver of a landlord's right to declare a forfeiture has bearing not only on the St. Louis 1 and 2 proceeding, but on all of the controversies now before this Court.

"'Any expressions or conduct of the obligee that leads the obligor reasonably to believe that performance on time will not be insisted on will operate as a waiver of the time condition, as to subsequent defaults as well as to antecedent ones. Such a belief by the obligor may be reasonable where it is induced by the obligee's receipt of a series of delayed payments without objection.' 3A Corbin on Contracts § 754 at pp. 494-495." 478 S.W.2d at 12.

"'[A] general rule has been established that where a lessor acquiesces in the making of belated payments of rent, in departure from the express terms of his lease in that regard, for a length of time and under circumstances establishing a course of dealing upon which the lessee may, in the light of such experience rely, the lessor cannot forfeit the lease for nonpayment

> of rent so represented, but must, if he desires to make use of the right to forfeit for that purpose, first warn the lessee of his intention as to future payments, and that the lessee is entitled to relief against a forfeiture otherwise attempted.' 49 Am.Jur.2d Landlord and Tenant §1080, p. 1042. Cases supporting this statement are collated in annotation 31 A.L.R.2d 321, 376-383 [§16]". 478 S.W.2d at 12-13.

* * *

The District Court Opinion contains four sentences with regard to St. Louis 2 and 3.

> "In a third case (St. Louis No. 2 and No. 3) the attorney for the receiver admitted on the record that the equities for the landlord were far stronger than they had been in the Queens Boulevard case. Overmyer's defaults in rent and taxes for the St. Louis property were substantial. The landlord sent notice of default in May and notice of termination in June, 1973. Yet, when the landlord thereafter commenced an action for possession, Overmyer entered a general denial, clearly a sham answer meant only to create delay." (20).

To the extent that the foregoing represents findings of fact, they are clearly erroneous (except as regards the finding that landlord sent notices of default and termination).

(a) The alleged "admission" by the attorneys for the Receiver. -- A review of the trial transcript (0-10) clearly indicates that the attorney for the

Receiver argued that the equities for the landlord in Queens Boulevard were weaker than those in the instant proceeding -- exactly opposite to the District Judge's conclusion. The one word in the transcript relied upon by the District Judge is obviously an error as shown when read in the context of counsel's entire statement. The colloquy was as follows:

> "THE REFEREE: Do you think this is Queens Boulevard Liquor?
>
> "MR SANDLER: I think the remedies are stronger -- going away from the individual case the equities are far stronger to the landlord in this case than in Queens Boulevard Liquor. A liquor store would be run from any one of one hundred different premises.
>
> "Here if the business has subtenants and you lose the subtenants' leases, you are out of business." (0-10)

The statement by Mr. Sandler in its entirety makes it clear that he argued that the loss of the liquor store lease might not be fatal to the business of the debtor in Queens Boulevard. "A liquor store could be run from any one of a hundred different premises". (0-10). However, if the debtor here loses its lease, it also loses rent from its subtenants which are its very business.

The only logical conclusion to be drawn in context is that the equities are stronger to the tenant in this case than in Queens Boulevard, and this is what counsel clearly intended to say.

The reference in the transcript to the equities being stronger to "landlord" rather than "tenant" appears to be a typographical error. At worst, it was a slip of the tongue clearly corrected by the words which followed.

(b) "Overmyer's defaults in rent and taxes for the St. Louis property were substantial." (20). -- As appears infra at 17-20, the landlord sought to terminate the lease by reason of rent and other defaults which on May 31, 1973 aggregated $43,498.00.

However, at the trial it was established that subsequent to May 31, 1973, in the summer of 1973, the debtor paid $17,000.00 directly to the landlord in partial payment of arrears (28) , and that the debtor caused $74,186.00 to be paid to the landlord by a third party towards the payment of such arrears in October 1973. (0-30). Thus, all of the arrears which formed the basis for the landlord's May 31, 1973 notice of default and June 27, 1973 termination notice were cured.

The landlord in this proceeding has not been candid with the Court on the question of arrears. One Howard R. Slater, a Chicago attorney, appeared at the trial and at first identified himself solely as an attorney. After attempting to stipulate certain facts, the following colloquy occurred between the attorney for the Receiver and Mr. Slater.

> "MR. SANDLER: . . . Mr. Slater may go under oath if he is a principal in this deal.
>
> "MR. SLATER: I am. I want the Court to be advised I not only proceed as an attorney, but as a principal." (0-17).

Under oath, Mr. Slater testified on direct examination to the May 31, 1973 default aggregating approximately $43,000.00 (0-21), admitted the partial payment of $17,000.00 (0-23), and erroneously stated that the May 31, 1973 default had not been paid in full by November 16, 1973 -- the date of the filing of the petition:

> "Q: As of November 16, 1973, had the defaults in the lease been cured by D. H. Overmyer?
>
> "A: No, sir, nor was there any way they could possibly cure other than by payment of one hundred percent of the default plus payment of the legal fees. No amount was tendered." (0-24).

Mr. Slater, thus, conveniently omitted from his direct testimony any mention of $74,198.65 paid to the landlord on account of rent and taxes due under the lease in October 1974. This fact was brought out on cross-examination, and the written stipulation dated October 19, 1973 which evidences such payment was marked as Receiver's Exhibit "1" in evidence (0-49).

The October stipulation expressly provides in paragraph 3 that $19,256.00 of the $74,198.65 will be applied to 1973 taxes. However, Mr. Slater, then in his role as an attorney, misled the Court by his statement that 1973 taxes were unpaid.

> "MR. SANDLER: What are the taxes?
>
> "MR. SLATER: Taxes are approximately twenty-four thousand dollars a year. We have not been paid since February of 1973. . . " (0-9).

The two payments made to the landlord after the May 1973 default in the sums of $17,000.00 and $74,198.86, respectively, total $91,198.86. This sum is far in excess of the $43,498.00 default declared by the landlord in May 1973.

The excess was to be applied to rent due the landlord which accrued after May 31, 1973. The amount of such rent is not clear from the record. According

to Mr. Slater, while not under oath, rent had not been paid from February 1973 to the date of the filing of the petition. The monthly rent is $7,932.00 due on the 23rd of each month, and taxes are approximately $24,000.00 per annum. (29A, Record on Appeal.)

Assuming that Mr. Slater is correct, pre-petition arrears would be $71,388.00 for rent (February 23, 1973 to November 23, 1973) and $21,000.00 for taxes (10-1/2 months for the period January 1, 1973 to November 16, 1973 at $2,000.00 per month). The total amount of arrears would thus be $92,388.00 (including the $43,398.00 default alleged by landlord in May 1973). Against this sum, the landlord was paid $91,198.00.

The balance, if any, is thus just over one thousand dollars. Yet, Mr. Slater, in his role as an attorney, advised the Bankruptcy Judge at the trial that arrearages were $140,000.00.

> "THE REFEREE: The amount of the arrearages total what?
>
> "MR. SLATER: Approximately one hundred forty thousand dollars including taxes." (0-9.)

Moreover, the default at issue on the basis of which landlord purportedly terminated the lease amounted to only $43,498.00. This default was subsequently cured by payment in full.

There is thus no monetary default on the basis of which the lease could be terminated. Even if there were, the Missouri courts have declined to grant forfeiture under the circumstances at bar. (See discussion; supra at 16-19.

(c) The debtor's denials in the Missouri action constituted 'a sham answer meant only to create delay" (20). -- The District Judge's conclusion that the debtor's answer in the Missouri proceeding was sham is not supported by the facts or applicable law.

The Missouri courts have held that acceptance of late rent payments over a period of time will result in a waiver of prior and subsequent defaults, even where there is a "no waiver" provision in the lease. Fritts v. Cloud Oak Flooring, supra. In the instant proceeding, the landlord testified to a pattern of late payments over three years (0-33), but a default was not declared until May 1973, and the entire default alleged in the May 1973 notice of default was subsequently paid.

The Missouri courts have further held that where a landlord seeks forfeiture, he will be held to "scrupulous observance of every requirement of common law" and that a "demand for rent must be made precisely

on the very day when the rent becomes due, and for the precise amount due". Waring v. Rogers, 286 S.W.2d at 379. The landlord offered no proof of the requisite demand. Under the circumstances, the District Judge's finding that the debtor's answer in the Missouri proceeding was a sham is clearly erroneous.

Similarly, the legal conclusion of the District Court that the St. Louis 2 and 3 lease was effectively terminated prior to the commencement of the bankruptcy proceedings constitutes reversible error.

Richmond 1

By reason of the Virginia debtor's failure to make a single month's rent payment, the landlord purported to terminate the lease by written notices dated July 23, 1973 and August 8, 1973 (N-10,11).

On August 8, 1973, the landlord re-entered and took possession of the property in the absence of any judicial proceedings whatsoever. The landlord contends in its brief that under Virginia law, it was entitled to automatically re-enter the premises upon the debtor's default without legal process and cites Va. Code §55-79.

However, the re-entry right conferred by Va. Code §55-79 was merely intended to serve as security for the payment of rent and not to alter the common law rules with respect to forfeiture of leases. The annotations to Va. Code §55-79, which appear in the 1974 Replacement Volume, provide in their entirety, as follows:

> "Reentry clause is mere security for rent - It seems that a clause of reentry for nonpayment of rent is in general considered as a mere security for the rent, and that a forfeiture will not be enforced, although the demand for the rent be made, provided the tenant satisfies the rent due and compensates the landlord for any damages he may have sustained in consequence of the former's default. Johnston v. Hargrove, 81 Va. 118 (1885).
>
> "This section was not designed to alter the rules of the common law in respect to the forfeiture of estates for nonpayment of rent, but to authorize a concise and abbreviated form of leases and other conveyances. Johnston v. Hargrove, 81 Va. 118 (1885).
>
> "Rule as to necessity for demand is unchanged. - By an ancient rule of the common law, before a lessor can exercise a stipulated right of reentry for breach of covenant to pay rent, he must make an actual demand upon the tenant for the payment thereof, unless by special agreement the requirement of demand has been dispensed with. The rule as respects the necessity for demand remains unaltered in general by this section. Johnston v. Hargrove, 81 Va. 118 (1885).
>
> "Demand must be made on last day of extended period. - Where the right of reentry is made to depend upon the fact that the rent shall be behind and unpaid for a specified period after the same becomes due, the demand must be made on the last day of the extended time; otherwise the lessor is not entitled to reenter, for every required formality must be strictly observed. Johnston v. Hargrove, 81 Va. 118 (1885)."

The landlord further contends in its brief below that irrespective of its statutory remedy, it had the express right under the lease to re-enter the premises and terminate for non-payment. In support of this contention, landlord cites Jabbour Bros. v. Hartsook, 131 Va. 176,108 S.E. 684 (1921), and Virginia Iron, Coal and Coke Co. v. Dickenson, 143 Va. 250, 129 S.E. 228 (1925).

However, the Court of Appeals for the Fourth Circuit has held that the result in the Jabbour and Virginia Iron cases does not deprive the courts of their equitable power to prevent leasehold forfeiture where rent arrears are paid. Galvin v. Southern Hotel Corporation, 154 F.2d 970 (4th Cir. 1946).

In Galvin, the Fourth Circuit reversed and remanded for further proceedings a decision of the District Court which upheld a leasehold forfeiture in reliance on the Jabbour and Virginia Iron decisions. The reasoning of the Fourth Circuit, and its application of Virginia law, is instructive:

> ". . . But every violation of a contract containing forfeiture provisions does not necessarily require an actual forfeiture of the defaulting party's rights. . . 154 F.2d at 973.

* * *

"The general principle that contractual provisions for forfeiture are looked upon with disfavor by the Courts is applicable to contracts of lease. Such stipulations are strictly construed and when they are invoked by a landlord for nonpayment of rent, equity may relieve against them if complete justice can be done by the payment or tender of the arrears . . . In Virginia, as the District Court pointed out in its opinion, it is held that a provision in a lease for termination thereof upon default in payment of rent or in default of compliance with some other covenant is valid and enforceable. Jabbour Bros. v. Hartsook, 131 Va. 176, 108 S.E. 684; Virginia Iron, Coal & Coke Co. v. Dickenson, 143 Va. 250, 129 S.E. 228. But when equitable considerations are involved, the law of Virginia is in harmony with the general equitable principles above stated. In Johnston v. Hargrove, 81 Va. 118, at pages 121, 122, it was said. . .

* * *

'And it seems that a clause for re-entry for non-payment of rent is in general considered as a mere security for the rent, and that a forfeiture will not be enforced, although demand for the rent be made; provided, the tenant satisfied the rent due, and compensates the landlord for any damages he may have sustained in consequence of the former's default.'" 154 F.2d at 973.

Thus, both under the Virginia statute and Virginia case law the right of re-entry exercised by landlord does not result in a termination of the lease, but merely is considered as security for the unpaid rent then due. In the instant proceeding the landlord has appropriated all of the debtor's estate and profits from the Richmond 1 warehouse since August 8, 1973. This warehouse earns a net profit of $40,000.00 annually and the $10,800.00 representing a one month default in rent has apparently already been cured.

> "Such [forfeiture] stipulations are strictly construed and when they are invoked by a landlord for nonpayment of rent equity may relieve against them if complete justice can be done by the payment or tender of the arrears." Galvin v. Southern Hotel Corporation, 154 F2d at 973.

* * *

The District Court Opinion refers to the Richmond 1 controversy in a single sentence.

> "In the Richmond #1 case the landlord acted under the rent default clause in his lease and terminated the lease with Overmyer well before the Chapter XI petition was filed." (19-20).

The conclusion of the District Court Judge that this lease was terminated prior to November 16, 1973 is in direct conflict with applicable Virginia law, and constitutes reversible error.

Columbus 3

In the Columbus 3 proceeding the landlord sent a "notice of termination" purporting to terminate the lease on August 22, 1973 (18B, 18C, Record on Appeal). No prior notice of default was given as required under the lease.

At the time the landlord purported to terminate the lease, the Ohio debtor was in default in the payment of additional rent under the lease consisting of $4,713.80 in real estate taxes and $471.30 in interest thereon, aggregating $5,185.10 (D-7, 8.) No action was commenced by landlord in Ohio to recover possession, declare the lease terminated or for comparable relief. It is clear that the Ohio courts would not have allowed forfeiture of the debtor's valuable long-term lease for a number of reasons.

First: It has been uniformly held in Ohio that a forfeiture for non-payment of rent can be declared only after the making of a demand for rent. 33 O Jur.2d Landlord and Tenant §433. No such demand has been alleged or proven by landlord.

Second: The Ohio courts have held that before a landlord can cause a forfeiture, he must strictly comply with the lease conditions. 33 O Jur. 2d, Landlord and Tenant §432. In the instant case, the lease provides in Section 15.01 that a failure to pay "additional rent" constitutes a default only if the landlord gives tenant 30 days written notice of default. If the default is not cured within the 30-day period, then the landlord can seek to terminate by written notice of termination

under Section 15.02 of the lease. (A true copy of the lease is annexed as Exhibit "A" to landlord's Request for Admissions [18B, Record on Appeal]. The landlord served a notice of termination but failed to allege or prove the giving of a prior notice of default with respect to the payment of additional rent or the making of repairs as expressly required under the lease.

Third: Even if the proper demand had been made, or notice given, it is clear that the Ohio courts would not have allowed forfeiture.

> "The general rule is that where a forfeiture is stipulated as the consequence of the non-payment of money within a time certain, or of the non-performance of a condition, or the breach of a covenant, compensation for which can be appropriately and precisely made in money, equity regards the provision for such forfeiture as, in substance, a security for the performance of the pecuniary obligation, which is looked upon as the essential thing; in such cases equity will relieve against the forfeiture on condition that compensation is made by the payment of the money, with interest for the delay. (citing cases.) This rule applies to forfeitures of leases. Thus, it is said that where compensation can be fully made, equity will generally relieve against such a forfeiture. (citing cases.) Even if all the terms of the lease have been broken, a court of equity may relieve against a forfeiture if the lessor can be made whole and all arrearages paid up. (citing cases.)" 33 O Jur.2d Landlord and Tenant § 441.

Fourth: The evidence shows that the debtor was generally late in the making of rent payments from the commencement of the lease in 1968. (D-11.) All of the prior rent payments were accepted late by landlord without protest or the declaring of a default. (D-12.)

Under these circumstances, the Ohio courts have held that the landlord's acquiescence in accepting late payments results in a waiver of strict performance under the lease and no forfeiture can be declared unless an "advance warning" is given by the landlord, once again requiring strict compliance with the terms of the lease. Lauch v. Monning, 15 Ohio App.2d 112, 239 N.E.2d 675 (1968); Bates & Springer, Inc. v. Nay, 91 Ohio L. Abst. 425, 187 N.E.2d 415 (1963). No such "advance warning" was alleged to have been given here by the landlord.

Moreoever, at the time of the landlord's purported termination of the lease in August 1973, all rent payments were current and only a small sum of additional rent for taxes was due. Thus, at the time of the purported termination, the rent arrears had actually been reduced from previously existing arrears.

* * *

The District Judge refers to the Columbus 3 proceeding in a single sentence.

"Likewise the history of Overmyer's unpaid taxes and failure to repair the Columbus 3 property caused the landlord to send notice of termination on August 22, 1973, three months before the filing of the Chapter XI petitions." (20-21).

The District Judge errs when he refers to a "failure to repair". The landlord's notice of termination does not mention repairs and no prior notice of default was alleged to have been given by landlord with respect to repairs. The August 22, 1973 notice of termination is accompanied by a letter, also dated August 22, 1973 from landlord's attorney, in which, in general language, it is alleged that the debtor failed to keep the building in good repair. The self-serving letter from landlord's attorney is not supported by any evidence and is rebutted by the testimony of the engineer employed by the Receiver to the effect that only "minor" paving at a cost of between $2,500.00 to $3,000.00 was required (D-24, 25).

In any event, as expressly provided in the lease, a breach of the covenant to repair, assuming such to be the case, does not constitute a default under the lease unless the landlord gives tenant a written notice of default and an opportunity to cure. No such notice of default was given.

The District Court Opinion with respect to Columbus 3 should be reversed.

Denver 4

The District Judge devotes three sentences in his opinion to the Denver 4 leasehold -- a property which currently earns a net profit of $23,200.00 per annum under a lease with an unexpired term of 33 years.

The District Judge states:

> "The facts in the Denver 4 case are much the same. In that instance, the landlord was required to redeem his property at a tax sale because of Overmyer's tax defaults. As a result, he too served notice of termination well before the start of proceedings under the Bankruptcy Act." (21)

The facts with respect to the purported termination of the lease by landlord are as follows:

(a) On August 14, 1973 the landlord notified the debtor of its intent to terminate the lease on September 16, 1973 by reason of default in the payment of rent and additional rent in the form of taxes and mortgage payments. (Exhibit "A" to complaint in Colorado action. [20I, Record on Appeal]). No prior notice of default was given.

(b) In the latter part of October 1973, landlord served and filed a summons and complaint in the District Court of Colorado seeking rent due under the lease and possession of the premises by reason of the termination of the lease (20I, Record on Appeal).

(c) An answer was interposed by the debtor on October 31, 1973 (20I, Record on Appeal). The debtor's answer asserted various affirmative defenses, including the following:

> "SIXTH AFFIRMATIVE DEFENSE
>
> "The notice sent by plaintiff was insufficient."
>
> "EIGHTH AFFIRMATIVE DEFENSE
>
> "By their conduct, plaintiff caused the 'subtenants' of defendant to fail to pay their 'rents' and thereby made it impossible or difficult for defendant to meet its obligations to plaintiff."

The Colorado action was stayed by order of the Bankruptcy Judge and the question of the termination of the lease was never determined in that action.

It is clear that under Colorado law the landlord would not prevail in his attempt at forfeiture. The Colorado courts, as do the courts of every other state, seek to prevent forfeiture.

> "We note however, that it is a settled principle of both law and equity that contractual provisions for forfeitures are looked upon with disfavor, 12 Am.Jur. 1016 §§ 436; 19 Am.Jur. 96, § 84, and that this applies with full force to stipulations found in leases and hence the rule that they are to be strictly construed against the party seeking to invoke them. 32 Am.Jur. 721, §§ 848." Murphy v. Traynor, 135 P.2d 230, 231 (1943).

The lease at issue provides, as do generally all of the other leases of the debtors, that a written notice of default must be given under Section 15.01 before the lease can be terminated under Section 15.02 thereof. (A copy of the lease is annexed to landlord's Request for Admissions.) (20D, Record on Appeal.)

The landlord failed to give the required notice of default. As a result, the August 22, 1973 termination notice was fatally defective.

Even where a lease does not expressly provide that notice of default is a prerequisite to termination, the Colorado courts have made a demand for rent a condition precedent to the bringing of an action for termination. Audubon Commercial Area Co. v. Skelly Oil Co., 268 F.Supp. 883 (D.Colo. 1967). In the Audubon case, a landlord sought to terminate a lease for non-payment of rent and served a termination notice without a prior notice of default or demand. Applying general and Colorado law, the United States District Court found for the tenant.

> "It is the conclusion of the Court that a demand for the payment of the overdue rent was a prerequisite to declaring a forfeiture, that no demand was made and that the right to a demand was not waived by the defendant [tenant]." 268 F.Supp. at 886.

By reason of the foregoing, the conclusion of the District Judge that the Denver 4 lease was terminated constitutes error.

The District Judge further fails to take note of efforts by the Colorado debtor to reduce lease arrears. The landlord's complaint in the Colorado action recites that the debtor repaid $20,724.00 advanced by the landlord for 1972 taxes in August or September of 1973. On or about July 2, 1973, $8,600.00 was paid by the debtor to the mortgagee (20I, Record on Appeal), and on or about August 14, 1973, the very day landlord purported to terminate the lease, the debtor tendered $2,500.00 to the landlord on account of rent. The landlord's attorneys returned the debtor's $2,500.00 check together with the alleged notice of termination by letter dated August 14, 1973. (Exhibit "D" to Landlord's Request for Admissions, 20D, Record on Appeal.)

- °O° -

In generalized statements with respect to the four proceedings in which the bankruptcy default clauses were not at issue, the District Judge refers to " . . . a course of conduct pursued by Overmyer which was designed to try the patience of even the most long-suffering owner." (21)

The District Judge concludes that:

> "The record in the. . . [four] cases presented no evidence of fraud or overreaching which might call for a resurrection of those leases, and consequently Judge Babitt's decision not to exercise his equitable power was clearly the correct one." (23).

In the first instance it should be noted that a lease which has not been validly terminated need not be "resurrected." In each of these four proceedings where the landlords contended they terminated prior to the filing of the voluntary petition, there was no judicial declaration that termination had occurred. In two cases, Richmond 1 and Columbus 3, no actions in the local courts were even commenced, and the case law in each of the four states in question holds that forfeiture can and will be denied. Based solely on the naked allegation by landlords that the leases were terminated, both of the lower court decisions simply assume such fact to be true without any independent findings or conclusions to support this erroneous result.

Moreover, the statement by the District Court that there was "no evidence of fraud or overreaching" by landlords "which might call for a resurrection of those leases" (23) injects a new and startling element into these proceedings.

Inequitable conduct by landlords was never litigated before the Bankruptcy Judge, and no effort was made by the Receiver or the debtors to develop any testimony along these lines. To the extent that such evidence is now deemed vital in these four proceedings, they should be remanded for further hearings to enable appellants to make a proper record.*

Having raised the issue of the landlords' conduct, the District Judge fails to note one example of "overreaching" by a landlord which does appear in the transcript of one of the four proceedings at issue. In the Denver 4 proceeding, the answer of the debtor in the Colorado action raised as an affirmative defense the interference by the landlord with the debtor's attempts to collect rents from its subtenants.

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*With respect to the remaining 11 cases, the District Judge also injects, for the first time, the issue of the landlords' conduct.

> "The record is barren, on the other hand, of any conduct on the part of the landlords which could in any way be described as unfair, over-reaching or vexatious" (16).

Similarly, this issue was never litigated and when the Receiver attempted to introduce evidence along these lines, it was stricken as irrelevant by the Bankruptcy Judge. Thus, in the Jacksonville 3 proceeding where the Receiver developed blatant interference by the landlord with attempts to lease space, the Bankruptcy Judge ordered the evidence stricken from the record (II-14-20). If this new issue, raised for the first time by the District Judge, is important in these proceedings, then all of the cases on appeal should be remanded for further hearings.

At the trial, the landlord, on cross-examination, begrudgingly admitted that he and his counsel met with the subtenants to suggest they withhold rents from the debtor, and that if the rents were paid to the landlord, the latter would indemnify them from claims of the debtor (F-55,56). This course of conduct went back three or four months prior to trial on January 24, 1974 (F-55,56).

"Q: Give us the substance of what you understood what your lawyer in Denver was trying to accomplish?

"THE REFEREE: If he knows?

"A: As I understand, the letter of indemnity is that the monies that have been withheld by the tenants are to be paid to me and if any demands are made upon them, they will have to pay them to Overmyer, it would be my responsibility.

"Q: So that in response to an earlier question when I asked if you had negotiated the rent be paid to you and you answered 'No,' your attorney has had negotiations as recently as a few weeks

"A: That's the first time, but the rent goes back three or four months.

"Q: Let's go back three or four months. You said there was a meeting or some communication between your Denver counsel and your tenants with regard to the payment of rent. Were you at that meeting?

"A: I was, yes.

"Q: What did your lawyer say to the subtenants at the time when the question of payment of rents came up?

"A: It was just being withheld; he suggested they be put into escrow and, evidently, they held it themselves, and that it wouldn't be put in any court escrow." (F-55, 56).

* * *

"Q: Neither you nor your attorney had made any statement at that meeting that the rent shouldn't be paid to Overmyer?

"A: I can't remember what my attorney said. I didn't say it.

"Q: Is it possible that your attorney may have said it?

"A: Is it possible?

"Q: Yes.

"A: It is possible. I don't know.

MR. SANDLER: I think we understand." (F-57).

In summary, it is respectfully submitted that the conclusion of the District Judge that the four leases not involving the bankruptcy default clauses were properly terminated prior to the commencement of the Chapter XI proceedings was clearly erroneous. Applicable local law, never considered by the lower courts, would not have allowed forfeiture under the circumstances.

Just as the courts below simply did not focus on crucial legal and factual details of each of these four proceedings, they used the same "shot-gun" approach with respect to the remaining eleven different cases, with equally erroneous results. Four of these cases, each involving the Florida debtor only, are discussed next in Point II, infra, which concerns the plan of arrangement.

POINT II

THE COURTS BELOW ERRED IN THEIR DETERMINATION THAT THE DEBTORS' PROPOSED PLAN OF ARRANGEMENT IS UNFEASIBLE.

The District Court finds two conditions precedent to the applicability of Queens Boulevard:

> "If the plan of arrangement is feasible and if it appears that there are compelling equitable and policy considerations for preventing forfeiture, then the bankruptcy clauses may be deemed inconsistent with the rehabilitative nature of a reorganization proceeding. Queens Boulevard Wine & Liquor Co. v. Blum, supra, at 4120; ..." (14).

The feasibility of the plan of arrangement will be discussed in this Point, together with collateral issues, and equity and policy considerations at Point III, infra at 55.

The District Judge, prior to his description of the contents of the plan, determined that:

> "The plan of arrangement proposed by the receiver (sic) in these cases, unlike the one involved in Queens Boulevard, has been rejected by the debtors' creditor committee, and found to be highly unrealistic by the Bankruptcy Judge." (18).

As argued in the First Brief (89-90), this supposed finding by the Bankruptcy Judge was based on a complete misconception and

misunderstanding by him of the plan. Among other things, he justified forfeiture of the leases because the plan ... "may not even be feasible" (53) ... when the plan becomes unfeasible only if the leases are terminated.

Not only does the District Judge rely on this clearly erroneous analysis of the plan by the Bankruptcy Judge, but also criticizes the plan because it contained no description as to how it would be funded (19). Perhaps the District Judge was impressed by the colorful misdescription of the plan by the Bankruptcy Judge (53). From this passing criticism, the District Court jumps to the conclusion, without a hearing, without a reason, without an explanation, that the plan "simply cannot be characterized as feasible." (24). This conclusion was damaging because, in the mistaken opinion of the District Court, a condition precedent to the availability of the equitable relief afforded by Queens Boulevard is a feasible plan. (14). Of course, Queens Boulevard does not so hold, and the plan of arrangement there, described by the District Court as "... on the verge of confirmation," (17), did not subsequently prevent the debtor from being adjudicated a bankrupt.

Consequently, while the existence of a feasible plan is not necessary in order to apply Queens Boulevard, the finding that the plan here was unfeasible nevertheless clouds the merits

of this appeal. The plan on file (56-58) is feasible because the annual net profits from the operations by the debtors of the warehouses on appeal is approximately $520,000 before taxes (see Schedule A attached hereto). The aggregate arrearages owed to the landlords involved in this appeal is just $418,000.00 and not some $12,000,000 implicitly ascribed to them in the Bankruptcy Court Opinion (34). If the long-term leases generating these profits are not terminated, their annual proceeds, perhaps supplemented by financing which could be secured by these leases, could fund the plan completely.

The real reason why this plan has not been accepted by the creditors committee is not because it lacks feasibility, but because it presupposes the continuation of the long-term leases at bar. The creditors committee is represented by the attorneys who also represent the very landlords seeking to deprive the debtors' plan of its most valuable assets, namely the leases. Should they succeed in obtaining the windfall benefit of unencumbered possession of the warehouses, these landlords will appropriate assets with a value far exceeding the amount of their claims, will impair the viability of the plan to the detriment of other unsecured creditors and will wind up with more than one hundred cents on the dollar while every other unsecured creditor receives substantially less either by way of confirmation of a modest plan or liquidation in bankruptcy.

These are the equities that should bear scrutiny by this Court. The conflict of interest between the landlords at bar and other unsecured creditors underlies this entire proceeding. The Receiver is the only voice heard on behalf of all of the other unsecured creditors, who are in danger of being disenfranchised by the very parties ostensibly acting on their behalf on the so-called creditors' committees, but really appropriating for themselves in this very proceeding the real assets of the debtors.

The plan is feasible, and the following discussion of just how it would operate with respect to the Florida debtor, selected because it held four leaseholds, will show this Court why.

Five of the long-term leases entered into by D. H. Overmyer Co., Inc. (Florida) have been litigated below and four are before this Court on appeal. The five warehouses concerned are Tampa 3, Jacksonville 3, Miami 2, Miami 3 and Miami 7.

The Tampa 3 litigation differs from the rest because in that case the Bankruptcy Judge, in reliance on Queens Boulevard, dismissed the landlord's application for termination of the Tampa 3 lease by virtue of the bankruptcy default, and the Receiver is now operating this property (Q-44-53). The Bankruptcy Judge affirmed (13). This judicial refusal to allow forfeiture of one

lease belonging to the Florida debtor, while simultaneously permitting forfeiture of its four other leases, brings into focus many of the critical issues in these proceedings.

If the Florida debtor were permitted to operate five warehouses, the assumption that it could not be rehabilitated would be erroneous. Even where the operation by the Florida debtor of one warehouse was involved, the lower courts found that the possibility of rehabilitation existed:

> "... and it would seem to me to be incomprehensible that Congress could have intended that the entire rehabilitative scheme of Chapter XI would be defeated by restoring property to a landlord where there has been no default and giving the landlord the benefit of all of the profits that the sub-leases yield to the debtor, and which the debtor needs in the exercise of its business, and in tne expectation that profitable ventures such as this will play a part in an order confirming the plan." (Q-50).

In affirming, the District Court stated:

> "... The court is satisfied that Tampa #3 is distinguishable from the cases on appeal, particularly in view of the fact that there were no rent or other pre-petition defaults, or evidence of otner inequitable conduct on the part of the debtor." (13).

The plan of arrangement for the Tampa 3 proceeding, however, is the same as the plan for the Jacksonville 3, Miami 2, Miami 3, Miami 7 and, indeed, every other proceeding

for every other warehouse involved in this appeal. Clearly, if the Tampa 3 decision is right, then either feasibility of the plan is not required in order to apply Queens Boulevard, or the plan is feasible.

The plan is feasible, not only as a matter of logic, but as a matter of fact. A legal and factual analysis of the four Florida cases will so demonstrate.

Florida case law endorses the exercise of equitable powers to prevent leasehold forfeiture. Deauville Corp. v. Garden Suburbs Golf and Country Club, 164 F.2d 430 (5th Cir. 1947); reh. denied, 165 F.2d 431 (1948); cert. denied, 333 U.S. 881 (1948); Rader v. Prather, 130 So. 15 (1930).

The Florida courts, as do the courts of other states where the warehouses are located, treat a contractual provision, allowing forfeiture of a lease because of nonpayment, as mere security for the payment. Rader v. Prather, supra. A mere tender of payment has been held sufficient to prevent forfeiture. Mayflower Associates, Inc. v. Elliott, 81 So.2d 719 (1955). Even where a judgment of possession has been awarded to a landlord,equity can still grant relief from lease forfeiture. Rader v. Prather, supra.

Under Florida law, then, the prior defaults of the

Florida debtor would not have automatically resulted in forfeiture. The essence of the equitable relief afforded by the Florida courts, as well as by other state courts is relief from these very defaults. Surely, it cannot be the law that where a financially troubled tenant has sought the protection of the Bankruptcy Act, the same equitable relief, now all the more necessary, is to be denied. A brief review of the four Florida proceedings is appropriate.

Jacksonville 3

The landlord commenced an action in the Florida courts to recover possession of Jacksonville 3 by reason of defaults by the debtor in payment of rent. In October 1973, the Florida debtor deposited $40,000 with the Florida court, representing payment of all arrears through October 31, 1973 (II-7). As a result, when the Florida debtor filed its voluntary petition on November 16, 1973, only $3,000* in rent was unpaid (II-7,8).

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* The landlord of Jacksonville 3 also sought to treat unpaid 1973 taxes as a default, although such taxes did not become due and payable until April 30, 1974. This was exactly the same situation which existed in Tampa 3 where the Bankruptcy Judge held that under such circumstances the 1973 taxes could not be considered as part of pre-petition arrears for purposes of determining whether a default existed. [See First Brief, Point II (93-103) and the Tampa decision contained in the transcript (Q-1-55)]. In any event, in the proceedings below, the Jacksonville 3 landlord relied solely on the occurrence of the bankruptcy default.

This modest sum was not only tendered at the trial, but payment was further offered as part of the Florida debtor's proposed plan of arrangement (II-9), (56-58).

Recognizing that under these circumstances the Florida courts would have prevented a forfeiture, the landlord, after November 16, 1973, pressed its attempts to secure termination by declaring a default under the bankruptcy default clause. When the facts with regard to the debtors $40,000 payment were brought to the attention of the court during the trial, the Bankruptcy Judge, referring to the lower court opinion of Hon. Orin Judd, District Judge, in Queens Boulevard, noted:

> "THE REFEREE: You may not have a termination here ..." (II-9)
>
> * * *
>
> "THE REFEREE: You may not find a forfeiture if Judge Judd is right." (II-10)

The Jacksonville 3 trial was held on March 26, 1973. Queens Boulevard was not affirmed by this Court until June 12, 1974. In the intervening period, the distinguishing facts of the Jacksonville 3 proceeding were apparently blurred by the sheer weight of the extensive and protracted litigation involving other warehouses.

The facts of the Jacksonville 3 matter are strikingly

similar to those of Tampa 3. If the Bankruptcy Judge had made specific findings of fact with respect to these controversies, as the Receiver contends he should have, then it is respectfully submitted that he would have prevented forfeiture in the Jacksonville 3 proceeding just as he did in the Tampa 3 matter.

If not, then at least the specific adverse facts on which the Bankruptcy Judge bottomed his conclusion of law would have been clearly set forth. The failure of the Bankruptcy Judge to make such specific findings frustrates the Receiver's ability to contest the generalized findings below on this appeal.

The Jacksonville 3 lease should be an asset of the Florida debtor's estate funding a viable plan.

Miami 2

The landlords of Miami 2 commenced eviction proceedings in the Florida courts prior to the filing of the involuntary petition. In their brief below (p.5), the landlords contend that they can terminate the lease under the Florida Delinquent Tenant Act (F.S.A. §83.05).

The landlord misstates Florida law. A statutory eviction proceeding under F.S.A. §83.05 or §83.20 merely establishes the right to possession and does not establish

whether or not a lease is terminated. Floro v. Parker, 205 So.2d 363 (1967); Rader v. Prather, supra. Even after a judgment has been rendered for a landlord in a statutory eviction proceeding, the Florida courts will invoke their equity powers to relieve a forfeiture. Rader v. Prather, supra.

In the Florida state court proceeding, the debtor deposited substantial sums of money with the court in payment of arrears. The landlords subsequently withdrew $42,000 to reimburse themselves for rent arrears and taxes. (J-65). As a result, at the time of the commencement of the bankruptcy proceedings, rent arrears were only $8,952. representing unpaid rent for October, and one-half of November, 1973:

"THE REFEREE: Forgetting everything else, at the time the petition was filed Mr. Overmyer's company is only in arrears for October and 15 days in November?

"THE WITNESS: Plus, approximately the year and a half interest, the financial statements, the modification to the building.

"THE REFEREE: Forget that. I am talking about dollar losses.

"THE WITNESS: In dollar losses it's October and November 1973.

"THE REFEREE: And half of November?

"THE WITNESS: That's right." (J-66,67).

Such arrears are inconsequential since the Miami 2 leasehold generates net profits of $68,356 per annum for the Florida debtor.* Full payment of all arrears has been offered to the landlords under the Florida debtor's proposed plan of arrangement. A tender of arrears has been held by the Florida courts as sufficient to prevent a forfeiture. Mayflower Associates v. Elliott, supra. Moreover, the landlords testified that they would not accept the arrears, preferring instead to appropriate the profits of the Miami 2 leasehold:

> "Q That's all I am driving at. If the rents were paid up that are in arrears, would you like to continue in your landlord-tenant relationship?
>
> "A Hell, no." (J-48)

The landlords cite other examples of alleged defaults by the Florida debtor. Thus they contend that the Florida debtor was required to maintain $800,000 in fire insurance and willfully reduced the coverage to $250,000. The Receiver showed that such $800,000 amount was properly allocated under a blanket policy (97).**

The landlord further cites as examples of default a failure of the debtor to supply financial statements and copies of subleases, and the making of alterations and improvements

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* One transcript of the Miami 2 proceeding is missing from the Bankruptcy and District Court files. A copy will be appended by opposing counsel to its brief for this Court. On page 96 of this transcript, the parties stipulated that gross profits were approximately $90,000 per year, which figure was adjusted to $88,356. From this amount was subtracted the average $20,000 overhead allocation, thus yielding net profits of $68,356.

**Page 97 of transcript referred to in footnote above.

without the landlords' prior consent.* The landlords did not allege these purported defaults in their application for termination of the lease, did not elect to declare a breach at the time of their supposed occurrence as required under the lease and, in any event, have waived such alleged defaults. Moreover, such stale and trivial events, under Florida law, cannot be the basis for a denial of equitable relief. Hyman v. Cohen, 73 So.2d 393, 400 (1954).

Finally, the landlord argues that the Florid debtor's pattern of late payments over a period of years should bar equitable relief (J-54). This argument is self-defeating inasmuch as the landlord willingly accepted late payments establishing a course of conduct giving rise to a waiver. Rader v. Prather, supra; see also Davidson v. Shivitz, 354 F.2d 946 (2d Cir. 1966).

It is obvious that the landlord is straining to find defaults in order to terminate a highly profitable lease under which the debtor earns a net profit of $68,356.00 per annum. (See Schedule "A" attached hereto). It is equally clear that

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*It is ironic that while the District Judge speaks generally of a failure of the debtors to make repairs the landlords of Miami 2 complain that the Florida debtor made "improvements" to the property. There was no claim by the landlord of Miami 2 that repairs were required.

under Florida law a forfeiture would be denied on the basis of the foregoing defaults.

The Miami 2 lease should be an asset of the Florida debtor's estate funding a viable plan.

Miami 3

The Miami 3 leasehold earns a net profit of $53,800 per annum (K-7) and has an unexpired term, with renewal options of 33 years. The landlord commenced two actions in the Florida courts:

(i) An action for possession based on non-payment of March and April, 1973 rent. The Florida debtor subsequently cured these arrears. (K-4);

(ii) An action for recovery of monies due under the Miami 3 lease. The parties stipulated a judgment of $59,860 in favor of the landlord of which $5,000 was for counsel fees and $1,609 for accrued interest. (K-5).

There is no dispute over the fact that the landlord is owed $59,860, and obviously this sum is more than the $3,000 pre-petition default in the Jacksonville 3 case and the $8,952 in pre-petition arrears in the Miami 2 case.

There is also no dispute, however, over these facts:

(a) the landlord accepted payment of all arrears on which its action for possession was based (K-4,5) preferring instead to pursue his remedies in an action for money only;

(b) the unpaid arrears have been tendered to landlord as part of the Florida debtor's proposed plan of arrangement and, in any event, appellants concede that the arrears must and will be paid as a condition to the continuance of the lease.

The impediment (17) suffered by the landlord can clearly be cured in full by the payment of the rent arrears, plus interest and counsel fees. Upon such payment, the landlord will have been wholly compensated for his inconvenience. On the other hand, to allow forfeiture by reason of the Florida debtor's curable defaults would be oppressive and a penalty. A long-term lease earning approximately $54,000 per annum would be extinguished and the landlord would receive a windfall at the expense of the Florida debtor and all of its other unsecured creditors. The landlord's motive is clear.

"THE REFEREE: In other words, you would like to remake the whole deal?

"THE WITNESS: At this point, yes." (K-19).

The Florida courts would not have allowed forfeiture on the basis of the monetary default and the Florida debtor should be given the opportunity to cure this default. The Miami 3 lease should be an asset of the Florida debtor's estate funding a viable plan.

Miami 7

The entire case of the landlord in this proceeding consisted of the landlord's Request for Admissions and the responding answers of the appellants. (L-4). The admissions and answers merely established that rent was due for three months in the sum of $33,306 and that the landlord purported to terminate the lease under the bankruptcy default clause. (16-D,16-F, Record on Appeal).

The landlord did not declare a default by reason of non-payment of rent nor was there any claim by the landlord that the debtor failed to keep the building in good repair. Indeed, the uncontradicted testimony of the engineer employed by the Receiver:

> "This really is a good building, in very good shape." (L-38).

* * *

In summary, it is clear that the alleged defaults of

the Florida debtor, which occurred prior to the filing of the petition for arrangement, would not have resulted in a forfeiture in legal proceedings in the Florida courts. The very lease defaults at issue are what Florida courts of equity typically grant relief from.

There appears to be no rational reason why conduct, which would not bar equitable relief if a forfeiture were declared on the basis of such conduct, should now foreclose equitable relief because the bankruptcy default clause has been invoked. If anything, equity should strain even harder to prevent forfeiture where the tenant seeks the protection of the Bankruptcy Act.

Analyzing the four Florida cases, the Receiver has shown that the generalized findings of the lower courts are not applicable and that the opinions below are woefully inadequate with respect to specific facts and applicable law. These inadequacies, resulting from generalized conclusions, permeate these proceedings to the manifest detriment of the Receiver and debtors. A case involving equities depends on facts, not insupportable generalities. These equities, their impact on the debtors and effect on bankruptcy jurisprudence, are discussed at Point III, infra.

POINT III

THE DISTRICT COURT ERRED IN ITS CONCLUSION THAT THE CONDUCT OF THE DEBTORS CONSTITUTED A BAR TO EQUITABLE RELIEF

It is settled that defaults by tenants under bankruptcy provisions in leases, notwithstanding Bankruptcy Act § 70b, 11 U.S.C. § 110, does not automatically mandate termination of the leases, since equity abhors forfeiture. Smith v. Hoboken R.R. et al., 328 U.S. 123 (1946); In re Fleetwood Motel Corporation, 335 F.2d 857 (3d Cir. 1964); Weaver v. Hutson, 459 F.2d 741 (4th Cir. 1972), cert.denied, 409 U.S. 957 (1972); Queens Boulevard Wine & Liquor Co. v. Blum, supra. These decisions established three criteria which, if satisfied by the facts of a particular case, create equities that balance in favor of continuation and not forfeiture of leases. These criteria, discussed at length in the First Brief (74-86) are: (i) forfeiture of valuable assets, (ii) rehabilitation of the debtor, and (iii) windfall to the landlords at the expense of other creditors and the debtor.

Notwithstanding the satisfaction of these three criteria by the facts of the proceedings at bar, the District

Judge determined that equitable relief should be denied to the debtors on the basis of their "conduct":

> "On the record it would appear that for a period of years prior to its filing under the Bankruptcy Act, Overmyer's conduct with respect to many of the landlords formed a pattern of consistent failure to meet its rent, repair, mortgage and tax obligations. Just prior to filing its Chapter XI petitions, Overmyer made promises with respect to remedying these defaults which could only have been made with an intention to deceive." (15).

The District Judge's damaging and unsupported generalizations indicate a uniform pattern of defaults and a far more serious reference to "an intention to deceive."

Alleged Intention to Deceive

The sole authority for the District Court's astounding statement that the debtors' conduct demonstrated an "intention to deceive" is a reference in a footnote to the Denver 1 proceeding (15-16).

The allegedly offensive behavior of the Colorado debtor stems from its unsuccessful efforts to arrange a loan to pay its debt to the Denver 1 landlord and promises of payment based on the prospective loan. In anticipation of the loan, promissory notes payable on October 31, 1973, with interest at 11% per annum, were issued (E-17) to the landlord. The District Judge notes that as late as November 14, 1973,

Overmyer purportedly assured the landlord that payment would be made. (15). This last minute and probably desperate effort of a debtor to achieve eleventh-hour financing should not be the basis for the thunderous disapproval of the District Judge.

The same facts could with equal validity be cited as part of the continuing good faith efforts of the debtor to continue its business without seeking the protection of the Bankruptcy Act. And presumably, if Overmyer knew it was hopeless, he would not have issued his notes to the landlord. (15).

The Denver landlord was well aware that the debtor was in financial difficulty and cannot claim naivete with respect to the "promises" to pay which the District Judge found so offensive. The landlord accepted late payments aggregating $328,000 from the Colorado debtor over a period of years without declaring a default. (E-50,51);

"Q And all of those payments were paid late, is that correct?

"A Correct.

"Q You accepted all these late payments?

"A Yes, I accepted them, but we gave them ---

"Q Did you complain?

"A I used to call Dan up at a quarter to eight in the morning.

"Q Did you ever terminate the lease because of those late payments?

"A No." (E-50-51).

It is not at all clear how he was deceived or how the debtor intended to deceive. The giving of promissory notes is hardly an act of deceit.

Finally, even if this one act can be construed as evidencing an intent to deceive, it cannot be expanded to apply to all of the corporate debtors. Substantial payments by various debtors on the very eve of bankruptcy [$91,000.00 in St. Louis 2 and 3, supra at 16; $40,000.00 in Jacksonville 3 (II-7); $30,000.00 paid or tendered in Columbus 3, supra at 33; $25,000.00 expended for repairs in Buffalo 2 (B-11); $42,000.00 paid in Miami 2 (J-65); all establish efforts by these debtors to pay their debts right up to the filing of the bankruptcy petitions.

Pattern of Defaults

The District Judge further points to a pattern of defaults on the part of the debtors as grounds for the denial of equitable relief. The Receiver contests this generalized finding as not supported by the record and clearly erroneous (see Point IV, infra at 67. However, assuming, arguendo

each debtor committed each and every act of default comprising the "pattern" (15), it is not clear why, as a matter of law, equitable relief is to be summarily denied.

It is settled that courts of equity will disallow forfeiture of a lease for non-payment of rent or other monetary obligations. Annot., 31 A.L.R.2d 321 (1953), citing cases throughout the United States.

> "This rule is based upon the notion that such condition and forfeiture are intended merely as security for payment of money." Pomeroy, Equity Jurisprudence §453 (5th ed. 1941).

Representative cases include Rader v. Prather, (Fla.) 130 So. 15 (1930); Galvin v. Southern Hotel Corporation, (applying Virginia law) 154 F.2d 970 (4th Cir. 1946); Howard D. Johnson Company v. Madigan, (Mass.) 280 N.E.2d 689 (1972). For an exposition of Ohio Law on this point, see 33 OJur.2d, Landlord and Tenant §441.

Some cases hold that equity can grant relief from forfeiture even after judgment has been rendered for the landlord (Rader v. Prather, supra) and even if the default was willful (Howard D. Johnson Company v. Madigan, supra).

Moreover, the federal law of this Circuit, prior to Queens Boulevard, consistently recognized the availability

of equitable defenses to debtor-tenants in leasehold forfeiture cases. Speare v. Consolidated Assets Corporation, 360 F.2d 882 (2d Cir. 1966); Davidson v. Shivitz, 354 F.2d 946 (2d Cir. 1966); Fifty Seven Associates v. Joseph, 322 F.2d 120 (2d Cir. 1963), aff'g, In re Sire Plan, Inc., 221 F.Supp. 68 (S.D.N.Y. 1963).

In the countless cases where courts have exercised their equitable powers to prevent leasehold forfeiture, the tenant has almost always been in default in payment of his rent obligation. Conversely, the landlord has always been, in the words of the District Judge, "impeded" (17) to the extent of such defaults. Yet such impediment has not prevented the nationwide application of equitable principles to avoid forfeiture of leases.

On balance, forfeiture wipes out the tenant's rights, while the impediment caused by monetary defaults can be relieved by payment. Nevertheless, the District Court erects the mere existence of such defaults as barriers to the availability of equitable relief in cases where additional defaults under the bankruptcy provisions are claimed. In other words, equitable relief from forfeiture is available in cases where the tenant is solvent, but becomes unavailable by reason of the same defaults where the tenant seeks the protection of the Bankruptcy Act. This cannot be the law.

The District Judge was swayed by the debtors' alleged inequitable conduct, consisting of supposed late payments, broken promises, attempts to obtain loans, and personal promissory notes. Unfortunately, such actions are the very stuff of bankruptcy. Such a pattern of conduct is common when a debtor is approaching insolvency and, in these economically troubled times, will face judicial scrutiny frequently in the months ahead in other cases.

The Bankruptcy Judge, who reviews such conduct on a daily basis, and the trier of fact in these proceedings, made no findings whatsoever that the debtors' course of conduct was unworthy of equitable relief.

The primary purpose of the hearings before the Bankruptcy Judge was to determine the value, if any, of the leaseholds, and not comparative equities. At the Denver 1 trial, where the District Judge found examples of alleged deceitful behavior, the Bankruptcy Judge stated, after listening to the testimony summarized in the prejudicial footnote, and just prior to cross-examination by the Receiver's counsel:

> " . . . Quickly, Mr. Sandler. To me this is all a case of dollars." (E-45)

The reading of each trial transcript will show that a typical landlord's case consisted of testimony of

alleged arrears under the lease, usually the failure to pay rent and, occasionally, a need for repairs.* Whenever the Receiver attempted to show that notices of default were defective or that late rent payments were always accepted, thereby raising legal and equitable defenses, the Bankruptcy Judge indicated he was unimpressed and pressed the Receiver to litigate profitability and value only.

The District Judge's conclusion that the pre-petition defaults represent such inequitable conduct as to bar relief from forfeiture represents a regression in bankruptcy jurisprudence and, if allowed to stand, will pose an insurmountable hurdle to any debtor seeking equitable relief. Pre-petition defaults exist in every insolvency proceeding.

They were present in Weaver, Fleetwood and Queens Boulevard, supra. In Weaver, supra, the tenant committed "numerous breaches" of the lease and was also delinquent in

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*With respect to repairs, very few landlords served notices of default upon the debtors for failure to maintain the warehouses prior to filing the voluntary petitions. The Bankruptcy Judge attached little importance to the repair question except as it related to the calculation of expenses of operating the warehouses, that is, striking an overall expense figure in order to compute net profits.

mortgage payments. 459 F.2d at 742. Continuous warnings by the landlord were ignored and the landlord commenced eviction proceedings in the state courts. The tenant's pre-petition pattern of conduct in Weaver, similar to that of the debtors at bar, did not foreclose the application of equitable principles by the Fourth Circuit. Rather, it was the inequity of the landlord's position that moved the court:

> ". . . the Landlord's insistence upon a forfeiture was highly unconscionable and inequitable in the circumstances--a demand for blood" 459 F.2d at 745.

In Fleetwood, supra, the tenant defaulted in the payment of several mortgage payments aggregating more than $35,000, failed to pay taxes and did not pay $40,000 in rent. The landlord was required to advance the mortgage and tax payments. The tenant's pre-petition pattern of conduct in Fleetwood, supra, likewise did not bar the application of equitable principles by the Third Circuit to prevent forfeiture of a leasehold.

The Bankruptcy Act prescribes a standard of conduct for debtors and sets forth certain acts that will bar confirmation of a plan of arrangement. Bankruptcy Act §366(3), 11 U.S.C. §766(3). The test is whether the debtor has committed any acts that would bar discharging a

bankrupt, such as fraudulent transfers, destruction of records, and the like. Bankruptcy Act § 14c, 11 U.S.C. §31(c). Nowhere does the Bankruptcy Act prescribe broken promises, long-standing defaults, arrearages and the like as sufficient grounds for barring confirmation of a plan. If it did, Chapter XI would offer illusory benefits because no debtor could be so pure and saintly as to merit relief.

The record is devoid of proof that the debtors committed any acts that would bar their discharge in bankruptcy. Moreover, there is no authority for the proposition that relief from lease forfeiture is deniable because of the type of defaults at bar. Absent gross misconduct on the part of the debtor-tenants, nowhere shown in these proceedings, forfeiture would be denied in every jurisdiction where the warehouses are located.

Rent obligations usually mature monthly and potential insolvents frequently make these payments late, if at all. When this Circuit, in Queens Boulevard, adopted the rationale of the Smith, Fleetwood and Weaver cases, Slip Sheet Opinion at 4122, it took a progressive step to make equitable relief available to debtors by enabling them to prevent termination of their valuable leaseholds, notwithstanding, the mere filing of the petitions for arrangement and prior rent defaults. Such

welcome relief will become a fiction if it can be denied on the ground that late rental payments, symptomatic of impending insolvency, form behavior that disqualifies debtors from seeking equity. In short, according to the District Court, the equitable relief from leasehold forfeiture which recently became available in this Circuit under Queens Boulevard will be denied to those debtors who were unable to pay their debts as they matured before filing, even though their inability to pay was the very reason they seek relief under the Bankruptcy Act.

The granting of equitable relief with one hand and the taking of it away with the other is cruel when viewed in light of the impressive body of state and federal law which affords tenants in default for non-payment of rent an array of equitable defenses and a wealth of remedies.

The District Court Opinion leaves a defaulting debtor-tenant in a position far worse than such debtor would be in the state courts, and this Court before Queens Boulevard. Now, pre-petition late rent payments, characteristic of almost every insolvency proceeding, bar equitable relief.* Surely, this narrow result was

*There is no doubt that the District Judge equated pre-petition rent defaults to inequitable conduct, for he expressly so stated in affirming the Tampa 3 result:

> "The Court is satisfied that Tampa #3 is distinguishable from the cases on appeal, particularly in view of the fact that there were no rent or other pre-petition defaults or evidence of other inequitable conduct on the part of the debtor (13)." (Emphasis added).

not intended by this Court in Queens Boulevard, which stands as a progressive development in bankruptcy jurisprudence and is fully consistent with proposed amendments to the Bankruptcy Act now under consideration by the House Judiciary Committee, which, if enacted today, would render this entire appeal moot. (First Brief, 117.)

POINT IV

THE LOWER COURTS MADE CLEARLY ERRONEOUS FINDINGS OF FACT

The lower courts together made clearly erroneous findings of fact with respect to (i) the landlords' comprising a majority of the unsecured creditors; (ii) value and windfall; and (iii) the debtors' conduct. Such findings formed the very bases of the decisions of the lower courts to allow forfeiture.

The Landlords As The Majority Creditors

The Bankruptcy Judge finds that:

> "While the total amount of the arrearages has not been exactly ascertained, it is nowhere in dispute that the sum is well in excess of $12,000,000, and the landlord-purchasers represent the largest of these creditors, by far, with whom the debtor hopes to deal in these arrangement proceedings" (34).
>
> * * *
>
> "Here, there has been no tender, nor could there be in light of the aggregate of the pre-petition debt due these landlords who make up the bulk of the debtor's creditors." (52).

The District Judge carried forward the error:

> ". . . and nowhere has it been denied that the landlords represent the large majority of those creditors, both numerically and financially" (16).

The foregoing findings buttress the conclusion of the lower courts that the debtors' plan of arrangement is unfeasible. For if the landlords involved in these proceedings represent a majority of the unsecured creditors in number and amount, it is obvious they will not vote for a plan which provides for the very continuance of the leases they hope to terminate.

This finding by the lower courts is nowhere supported by the record and is clearly erroneous. As appears from Schedule A annexed hereto, the monies due the landlords is approximately $418,000.00 or less than 3.5 percent of the $12,000,000.00 in arrearages referred to by the Bankruptcy Judge.

Value and Windfall

The Bankruptcy Judge found that:

> " . . . the receiver and debtor, wisely, have chosen to litigate these twenty disputes in all of which the sublease operations of the debtor yield a substantial profit." (39)

The District Court confused this issue by stating in a footnote that since future profits from short-term subleases are unpredictable and expenses likely to increase, their value and the concomitant windfall are "largely illusory" (17-18). To support this finding, the District

Judge criticized charts supposedly attached to appellants' briefs showing "projections", when in fact the Receiver's First Brief merely summarized the current net income established at the trials. (119-120) His conclusion is, at best, naive; the landlords are not chasing illusions, for there is nothing illusory about more than half a million dollars in net annual profits. The landlords understandably want unencumbered possession of profitably operated warehouses. Value and windfall are not in dispute. The District Judge, attempting to bolster his decision on every conceivable ground, thus came to a damaging conclusion unsupported by the record, unsupported by the Bankruptcy Judge and unsupported by the landlords themselves. By way of illustration:

Edison 24

"Q Do you consider this as something of substantial value to you?

"A Absolutely. (H-48, 49)

"THE REFEREE: Frankly, on the evidence I have heard this morning, I don't even know why you bothered with any of this. I frankly don't know because, quite candidly, I had heard enough on the evidence this morning to indicate this has a substantial value to the estate without putting a dollar on it. I don't know what motivates you fellows.

How much do you think I need to exercise an equitable conscience? (H-119)

* * *

" . . . you would like to get that extra sixty thousand dollars?

"THE WITNESS: Exactly." (H-49)

Miami 3

"MR. STAR: We concede that the property without the present lease has value." (K-18)

Boston 6 and 7

"Q Was there a conversation with Mr. Kaplan (the landlord) in which he offered to purchase the lease owned on Boston 6 and 7?

* * *

"THE REFEREE: . . . He told us he offered one hundred thousand dollars." (A-84)*

Minneapolis 4

"MR. SANDLER: . . . if your Honor please, counsel have agreed to stipulate in lieu of the testimony of the debtor's appraisers, . . . that both parties will stipulate that the leasehold interest of the debtor and receiver has a value of one hundred thousand dollars." (M-55)

The finding by the District Judge that profits and windfall were "largely illusory" is clearly erroneous.

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*The debtor's witness testified that the landlord's offer for the Boston 6 and 7 leasehold was $200,000.00 (A-85).

The Debtors' Conduct

The generalized findings of fact with respect to the debtors' conduct, purportedly made by the Bankruptcy Judge, and relied upon by the District Judge, were re-stated by the latter as follows:

> " . . . a pattern of consistent failure to meet its rent, repair, mortgage and tax obligations." (15).

The foregoing pattern was ascribed by the lower courts to each debtor. No consideration was given to contrary facts which clearly show the efforts of these financially troubled debtor-tenants to pay their debts. There was no distinguishing between different fact patterns in the different proceedings. There was no recognition by the courts below that the so-called adverse findings do not apply equally to each debtor.

It is submitted that the generalized findings with respect to the debtors' pattern of conduct are clearly erroneous, and that the generalized application of these facts to all of the debtors constituted further error. A capsule review of the various proceedings demonstrates why.

In Boston 6 and 7, a property which earns $73,583.00 in net profits per annum for the debtor,

only October 1973 and half of November 1973 rent was owed at the time of the filing of the petition. (A-8). However, in prior periods arrearages generally averaged three months and were always accepted by the landlord. (A-11). The landlord contended that $93,000.00 in repairs were required, but the Receiver's engineer testified after an inspection of the warehouse that the work could be done for $15,000.00. (A-66). The landlord never declared a default with respect to the alleged need to make repairs. The debtor's conduct was not such as to foreclose equitable relief.

In Buffalo 2, only one and one-half months' rent was owed at the time of filing of the petition (16E, 16F, Record on Appeal) and the debtor, three months prior to such filing, expended $30,000.00 for new paving and other repairs. (B-11, 12). No claim was made by the landlord that additional repairs were required. The debtor's conduct was not such as to foreclose equitable relief.

In Columbus 3, where the landlord did not rely on the bankruptcy default clause, the landlord sought termination solely on the basis of non-payment of $4,713.80 in real estate taxes and $471.30 in interest. (D-7,8). The landlord never declared a default based on repairs

and testimony at the trial established that only some "minor" work was required at a cost of between $2,500.00-$3,000.00. (D-24,25). The debtor's conduct was not such as to foreclose equitable relief.

In Denver 1, the landlord never elected to declare a default based on repairs or non-payment and relied solely on the bankruptcy default clause. The debtor's conduct was not such as to foreclose equitable relief.

In Denver 4, where the landlord did not rely on the bankruptcy default clause, $28,000.00 was paid and $2,500.00 was tendered by the debtor in the period immediately preceding the filing of the petition, supra at 33. It was established at the trial that the landlord had interfered with rent collections from subtenants in the pre-petition period, supra at 35-37. Finally, the landlord did not claim any default based on repairs. The debtor's conduct was not such as to foreclose equitable relief.

In Detroit 8, no testimony was offered and the parties merely stipulated profitability and arrears without any allegations of improper conduct. (G-1-12). There were no stipulations with respect to repairs. The debtor's conduct was not such as to foreclose equitable relief.

In Edison 24, there is no claim by the landlord of the need for repairs and no testimony was offered on this point. The landlord testified to pre-petition defaults as high as $65,000.00 (H-27). However, by the time of the filing of the petition for arrangement, arrears had been reduced to $16,800.00. (H-62). In constrast, the Edison 24 lease generates gross profits of $86,916.00 per annum (H-121), or annual net profits of $73,583.00. The debtor's conduct was not such as to foreclose equitable relief.

In Jacksonville 3, pre-petition defaults were only $3,000.00, and $40,000.00 was paid by the debtor towards arrears 30 days prior to the filing, supra at 44-46. No claim was made by landlord with respect to repairs The debtor's conduct was not such as to foreclose equitable relief.

In Miami 2, more than $42,000.00 was paid by the debtor to the landlords reducing arrears at the time of the commencement of bankruptcy proceedings to $8,952.00 for a one-and-one-half-month period. The landlords do not allege a failure to repair. To the contrary, the landlords, in an effort to raise every possible default, no matter how trivial, allege that the debtor made "improvements" to the property without prior consent, supra at 46-50. The debtor's conduct was not such as to foreclose equitable relief.

In Miami 3, arrears of $59,860.00 are substantial, but so are net annual profits to the debtor of $53,800.00. There is no default alleged with respect to repairs, supra at 50-52. The debtor's conduct was not such as to foreclose equitable relief.

In Miami 7, the landlord's entire case consisted of Requests for Admissions and the responding answers of the appellants, establishing arrears of $33,306.00. However, the landlord did not declare a default by reason of non-payment, nor is any complaint made with respect to arrears, supra at 52. The debtor's conduct was not such as to foreclose equitable relief.

In Minneapolis 4, the landlord commenced several pre-petition proceedings in the state courts based on non-payment of rent. However, on November 16, 1973 all rent was paid (M-14) and termination was sought solely under the bankruptcy default clause (M-4). There was no default claimed with respect to arrears and the landlord stipulated that the lease had a value of $100,000.00 (M-55). The debtor's conduct was not such as to foreclose equitable relief.

In Richmond 1, the debtor defaulted in a single month's rent payment. Based on this single default, the

landlord claims the lease terminated automatically, without judicial process, supra at 21-25. The debtor's conduct was not such as to foreclose equitable relief.

In St. Louis 2 and 3, the debtor paid, and caused to be paid, $91,000.00 to the landlord just prior to the filing of the petition, supra at 16-20. The debtor's conduct was not such as to foreclose equitable relief.

In San Francisco 3, the landlord proceeded only under the bankruptcy default clause (P-3). The engineer employed by the Receiver conceded that in addition to routine maintenance, $12,000.00 would be required to put the building in "top shape" (P-48). The debtor's conduct was not such as to foreclose equitable relief.

* * *

The foregoing summary is not intended to justify the defaults of the debtors, but merely to demonstrate distinguishing facts, like those relating to repairs, between the different proceedings and to underscore that the actions of the debtors were typical of tenants approaching bankruptcy. This conduct should not generally be equated with such unconscionable behavior as to deny them the equitable

relief from leasehold forfeiture traditionally allowed. On the contrary, substantial payments made by several of the debtors on the eve of bankruptcy demonstrate good faith in an effort to survive.

The findings by the District Judge that the debtors made promises with "an intention to deceive" (15), and that defaults "seriously impeded the financial position of the landlords", (17) is not supported by the record and is clearly erroneous.

The finding by the District Judge of a " . . . consistent failure (of the Debtors) to meet its rent, repair, mortgage and tax obligations" (15), and the indiscriminate application of these generalized events to each debtor, without regard to substantial payments by certain debtors in reduction of arrears, and other distinguishing factors, constitutes further error.

POINT V

THE DISTRICT COURT ERRED IN ITS CONCLUSION THAT THERE WAS NO NEED FOR SPECIFIC FINDINGS OF FACT WITH RESPECT TO THE FIFTEEN SEPARATE PROCEEDINGS AT BAR.

The Receiver's argument with respect to this point is set forth in the First Brief (113-116).

It is respectfully submitted that the need for specific as opposed to general findings is clear from the analysis of the four proceedings in which the brankruptcy clause was not at issue, supra at 5-37 and the four Florida proceedings, supra at 41-54 . The facts of these eight cases, as well as the remaining proceedings which are the subject of this appeal, vary widely. Justice cannot be done in these proceedings unless there are specific findings with respect to each.

The issue before this Court is a grave one. Denying the debtors equitable relief from leasehold forfeiture, particularly in light of the Queens Boulevard decision, will set a legal standard which should be clear and unequivocal. The facts are at the heart of such determination. The Bankruptcy Judge rendered his opinion "on the totality of the evidence adduced at the trial" (39) and declined to exercise his equitable

powers "on the facts here". (55). The District Judge relied on the alleged findings of fact below in concluding that equity should not intervene.

The generalized review of the Bankruptcy Judge simply did not address itself to the varying fact patterns of each separate proceeding. Moreover, it is not clear that the "essential findings . . . contained in Judge Babitt's memorandum decision at pages 9, 10 and 11," relied upon by the District Court (21-22), were really findings at all.

Page 11 of the Bankruptcy Court Opinion (36) contains the most damaging adverse "findings" ("substantial default in payment . . . need of repair . . . mortgage foreclosures were threatened . . . adverse tax action was being taken . . . ", etc.). These are the alleged findings which persuaded the District Judge.

However, a careful reading of pages 11 and 12 (36-37) of the Bankruptcy Court Opinion reveals that these damaging "findings" are not findings at all, but rather, a recitation of the claims of the landlords, followed at the bottom of page 11 (36) and continued on page 12 (37) with the defenses thereto asserted by the Receiver and the debtors.

The so-called findings are introduced by the Bankruptcy Judge, at page 11 of his Opinion with the words "The litany was the same" (36). The balance of the lengthy paragraph constituting most of page 11 (36) is a general recitation of the defaults merely alleged by the landlords, and not necessarily proved at the trials.

The word "litany" is defined in The Random House Dictionary of the English Language (Unabridged ed. 1967) as "a ceremonial or liturgical form of prayer consisting of a series of invocations or supplications . . . " A litany is hardly a fact.

Immediately following the "litany" paragraph on page 11 (36) of the Bankruptcy Court Opinion is a new paragraph which commences as follows:

> "The response by the receiver, usually joined in by the debtor, was . . . " (going on to state the various defenses being asserted) (36-37)).

It appears clear that the Bankruptcy Judge was merely summarizing claims and defenses. The words "findings of fact" nowhere appear in the Bankruptcy Court Opinion.

Further, even if the statements by the Bankruptcy Judge are deemed findings, there should nevertheless be

specific findings with respect to each proceeding rather than a single generalized finding. As has been shown, supra, the facts of these proceedings vary and the lack of specific findings with respect to each frustrates appellants' ability to challenge such findings on this appeal.

Under the circumstances the order appealed from should be vacated and the matters at bar remanded for appropriate specific findings of fact.

CONCLUSION

A final word is in order on the misplaced emphasis by the lower courts on the fact that the financial position of the landlord in Queens Boulevard, supra, was protected by a one month security deposit (17, 51). Surely, this cannot be one of the pivotal facts upon which the future applicability of the progressive principles enunciated in Queens Boulevard will be determined.

However, for whatever reason, it should be pointed out that the landlords in these proceedings are, in general, far better protected from financial loss than the landlord who typically holds a one month security deposit. The annual profits of the debtors' leasing operations even over a short period, will far exceed the value of a one month deposit. Many of the landlords have admitted as much by their testimony that they would reject payment of arrears, preferring instead to terminate the leases and appropriate the ongoing profits (First Brief, 97, 98).

They should not be allowed by this Court to such a windfall for all of the reasons set forth by the Receiver in this brief.

Respectfully submitted

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November 1, 1974

SCHEDULE "A"

Summary of Evidence with respect to Economics of Warehouses on Appeal

Warehouse	Square Feet	Annual Gross Profit	Annual Over-head*	Pre-Petition Lease De-faults**	Annual Net Profit	Balance of Lease Term In-cluding Renewals
oston 6 & 7	240,000	$113,680	$40,000	$35,552	$78,680	34 years
uffalo 2	120,000	63,888	20,000	14,187	43,888	33 years
olumbus 3	120,000	35,232	20,000	15,505	15,232	24 years

* At a hearing on April 18, 1974, the average overhead expense was determined by the Bankruptcy Judge to be $20,000 per annum per 120,000 foot warehouse. The Receiver submits that this figure is unrealistically high in determining profitability inasmuch as it includes the non-recurring costs of the administration of the Chapter XI proceedings.

** The Receiver has scheduled all rent and taxes due up to the filing of the petitions for arrangement on November 16, 1973, as "defaults". However, not all Landlords elected to declare a default under the lease by reason of such arrears, relying instead solely on the bankruptcy default provisions. In some instances the amount is greater than the default scheduled above by reason of pre-petition arrears which accrued subsequent to the filing of the petitions.

SCHEDULE "A" (cont'd.)

Warehouse	Square Feet	Annual Gross Profit	Annual Overhead*	Pre-Petition Lease Defaults**	Annual Net Profit	Balance of Lease Term Including Renewals
Denver 1	120,000	$35,000	$20,000	$59,800	$15,000	33 years
Denver 4	120,000	43,200	20,000	16,100	23,200	33 years
Detroit 8	120,000	96,000	20,000	95,000	76,000	74 years
Edison 24	80,000	86,916	13,333	16,800	73,583	35 years
Jacksonville 3	80,000	18,000	13,333	3,000(a)	4,667	34 years
Miami 2	120,000	88,356	20,000	8,900	68,356	33 years
Miami 3	120,000	73,800	20,000	59,860	53,800	33 years
Miami 7-9	120,000	8,556	16,666	33,306	(8,110)(b)	38 years
Minneapolis 4	120,000	51,600	20,000	(c)	31,600	35 years
Richmond 1	160,000	66,000	26,000	10,800	40,000	14 years
St. Louis 2 & 3	160,000	(d)	(d)	(d)	(d)	58 years
San Francisco 3	120,000	23,136	20,000	49,170	3,136	23 years
				$417,980	$519,032	

Pre-petition rent arrears for Jacksonville 3 are approximately $3,000. In addition, approximately $12,000 for 1973 taxes became payable in 1974, after the filing of the petition. The 1973 taxes are not a lease default, supra at 44-46.

The profitability of the Miami No. 7-9 warehouse does not appear from the record.

SCHEDULE "A" (cont'd.)

(c) The landlord of Minneapolis 4 claims that interest and legal fees aggregating approximately $8,000 are due from the debtor. No pre-petition rent arrears are alleged.

(d) The extent of the arrears, overhead and net profit with respect to St. Louis 2 & 3 are not clear from the record. Overhead and net profits are affected by the fact that the subtenant of the debtor makes all repairs and pays all insurance. Substantial payments were made on account of pre-petition arrears but the balance of the arrears, if any, is not clear from the record, supra at 16-19.

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Wachtell Lipton Rosen & Katz the attorneys for the ~~respondent~~ Landlords of Boston 6 + 7 + Miami 2 by leaving ~~mailing~~ ~~three~~ five copies thereof at his office located at 299 Park Avenue New York, N.Y.

Bert Myers

Sworn to before me this 1st day of November, 1974

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4516917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Hahn Hessen Margolis & Ryan the attorneys for the ~~respondent~~ Landlords of Buffalo 2, Columbus 3 Denver 4 + Miami 7 by leaving ~~mailing~~ ~~three~~ five copies thereof at his office located at 350 Fifth Avenue New York, N.Y.

Bert Myers

Sworn to before me this 1st day of November, 1974

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4516917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Backner Tallis & Mantell appellees the attorneys for the ~~respondent~~ Landlords of San Francisco 3 by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at 850 Third Avenue New York, N.Y.

Bert Myers

Sworn to before me this 1st day of November, 1974

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Pickerson Kramer Lowenstein Nessen Kamin & Soll appellees the attorneys for the ~~respondent~~ Landlords of Minneapolis 4 by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at 919 Third Avenue New York, N.Y.

Bert Myers

Sworn to before me this 1st day of November, 1974

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

WILLARD VALADE being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on McManus & Ernst the attorneys for the ~~respondent~~ appellees by leaving ~~mailing~~ two ~~three~~ copies thereof at his office located at 295 Madison Avenue New York, N.Y. for Landlords of Miami 3

Willard Valade

Sworn to before me this 1st day of November, 1974

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518017
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

WILLARD VALADE being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Rogers & McGrath the attorneys for the ~~respondent~~ appellees by leaving ~~mailing~~ two ~~three~~ copies thereof at his office located at One Chase Manhattan Plaza New York, N.Y. for Landlords of Detroit 8

Willard Valade

Sworn to before me this 1st day of November, 1974

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518017
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Zalkin Rodin & Goodman the attorneys for the ~~respondent~~ Appellees by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at 750 Third Avenue New York, N.Y. Landlords of Jacksonville 3

Bert Myers

Sworn to before me
this 1st day of
November, 1974

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

WILLARD VALADE being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Baker Hostetler & Patterson the attorneys for the ~~respondent~~ Appellees by ~~leaving~~ mailing ~~three~~ two copies thereof at his office located at Union Commerce Building Cleveland, Ohio 44115 Landlord of Denver 1

Willard Valade

Sworn to before me
this 1st day of
November 1974

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK.
COUNTY OF NEW YORK

WILLARD VALADE being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Henry J. Bricker the attorney for the ~~respondent~~ appellant by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at 40 Exchange Place New York, N.Y.

Landlord of Edison 24.

Willard Valade

Sworn to before me this 1st day of November, 1974

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

WILLARD VALADE being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Abberley Kooiman the attorney for the ~~respondent~~ appellant by leaving ~~mailing~~ ~~three~~ two copies thereof at his office located at 521 Fifth Avenue New York, N.Y.

Marcellino + Clay

Landlords of Richmond 1

Willard Valade

Sworn to before me this 1st day of November, 1974

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

WILLARD VALADE being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Weinstein Sheller & Kay P.C. Landlords of St. Louis 2 & 3 ~~appellant~~ ~~respondent~~ William S. Kay the attorney for the ~~respondent~~ by ~~leaving~~ mailing ~~three~~ two copies thereof ~~at~~ his office located at 118-21 Queens Boulevard Forest Hills, New York 11375

Willard Valade

Sworn to before me
this 1st day of
November 1974
Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976

STATE OF NEW YORK
COUNTY OF NEW YORK

WILLARD VALADE being duly sworn deposes and says: On November 1st, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on ~~appellant~~ Levy & Rubach the attorney for the ~~respondent~~ Debtors by leaving ~~mailing~~ three two copies thereof at his office located at 225 Broadway New York, N.Y.

Willard Valade

Sworn to before me
this 1st day of
November 19
Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976